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AFB Morgan

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF UTAH IN AND FOR UTAH COUNTY.

.....

PROVO RESERVOIR COMPANY,
a Corporation,
vs. Plaintiff,

PROVO CITY, et al.,
Defendants.

No. 2888 Civil.

.....

DECISION ON ISSUE RAISED AS TO DISQUALIFICATION
OF PRESIDING JUDGE.

.....

This action is brought by the plaintiff against the defendants to determine the right, title and interest of each to the waters of Provo River and the use thereof, and to have determined by decree of court the proper means and methods of the distribution of the said waters to those entitled thereto.

The action was commenced February 6th, 1914. There are several hundred defendants. The cause has been before the court on temporary hearings in the years 1914 and 1915, wherein temporary orders have been made by the court, distributing said waters during said years and appointing commissioners to distribute the same. Said orders and appointments have been assented to by stipulations of all parties represented at said hearings.

The files in the cause show that over seventy of the defendants have demurred to plaintiff's complaint. Some of said demurrers have been argued to the court and some have been submitted without argument. All the demurrers have been by the court overruled and the issues are joined.

On the regular calendar day for the October term of the

court this cause was set for trial for December 14th, 1915. At the time the cause was set for trial the plaintiff announced that it took the position that the Presiding Judge of the court was disqualified to try the cause. At the suggestion of the Presiding Judge, the plaintiff prepared and filed appropriate pleadings raising that issue and a hearing was duly noticed. The issue was joined by some of the defendants and a hearing on the same was had on October the 25th, 1915. The court heard the evidence adduced and the arguments of counsel. The Judge then announced, and now announces, that he has no bias or prejudice for or against any of the parties to the action; he then announced, and now announces, that he has not formed or expressed any opinion on the merits of any issue of the action.

The plaintiff urges that the presiding Judge is disqualified to try the cause, first, because he is the owner of certain real property in Provo City, Utah, to which certain of the water claimed by the defendant, Provo City, in this action, is appurtenant; and, second, because the Judge attended and took part in certain meetings held by part of the parties to this cause in April, May and June of the year 1912, and that he represented some of the parties at said meetings.

The evidence shows that the Judge owns two parcels of real property in Provo City, one about 100 feet in length by 66 feet in width; the other about 25 feet in length and 20 feet in width; that his home is situated on the larger tract, and his barn on the smaller tract; that neither of said parcels of land have been irrigated for many years; that the only water used by the Judge comes through the City water mains or pipes, and that he uses the same for culinary, domestic and lawn-sprinkling purposes; that it is conceded that none of said waters used by the Judge is in controversy in this action; that the parcel of land on

which the home is situated has been built up or raised so that it would be impossible to convey water thereon from the irrigation ditches of Provo City, unless the water was pumped thereon; and further, that the Judge disclaims all right, title and interest to any of the irrigation water claimed by Provo City in this action. The evidence shows that the Judge has paid an irrigation assessment of thirty cents each year to the defendant, Provo City.

The evidence adduced shows that some of the parties defendant attended certain meetings in April, May and June of the year 1912, at the invitation of the plaintiff, and that said Judge attended and took part in said meetings as a representative of some of the parties defendant. It appears that said meetings were held at the instance of the plaintiff, to attempt to secure the consent of all parties interested in the use of the waters of Provo River, to have applied to the Provo River system the provisions of Chapter 1 of Title 40 of the Compiled Laws of Utah, 1907; that said Judge did suggest at said meetings that the farmers seemed to be opposed to plaintiff's proposal. A committee was appointed by the parties present at said meetings to effect a working agreement between the water users of said river, under which the waters of the river might be distributed ⁱⁿ to the users ~~during~~ the year 1912, during what was termed by the President of the plaintiff as the "intermediate stage of the river". Said Judge was not a member of said committee and he offered no advice or suggestion as to what the terms of said working agreement should be to anyone.

From reading plaintiff's complaint it appears that the principal question to be determined in this action is the duty of the waters flowing in the Provo River. We will frankly state now that it was impossible for said Judge to have offered any advice or to have made any suggestions to said committee or

anyone present at said meetings on the duty of the water of Provo River, because he had no knowledge or information then, nor has he any knowledge or information now, sufficient to make even a guess, as to what the duty of the water of Provo River has been in the past, or what it is at the present time, or what it should be in the future.

The evidence shows that the parties present at said meetings adopted a working agreement for the year 1912, for the distribution of the waters of Provo River during the period mentioned as the "intermediate stage of the river".

The evidence shows that said Judge was elected at the November election in 1912; that he immediately resigned as City Attorney of the defendant, Provo City, and that since his election he has held no relation to any of the parties to this cause.

One is placed in a position of embarrassment to decide whether or not he is disqualified to try a cause; but it seems that the Presiding Judge of the court is required to make such a decision, because the question here involved is one of jurisdiction. The law seems to be that the Presiding Judge of the Court having general jurisdiction over the parties to and the subject matter of the action, cannot legally decline to try the cause, if some of the parties to the cause demand that he proceed to try the same, unless he is disqualified, for the reason that no jurisdiction attaches to the court to which the cause is sent.

Therefore, it is now held that the Presiding Judge of the above-entitled court is not disqualified to hear and determine the issues raised in this action.

It is earnestly suggested, however, by the Presiding Judge, that in view of the fact that much time and money will probably be necessarily expended in the trial of this cause, that the question here raised and decided be presented to the Supreme

Court of the State of Utah for review by said Court before the trial of the cause is commenced. We can arrange our calendar so as to give ample time for that to be done. By taking such action a mistrial of the cause for want of jurisdiction can be avoided.

Dated at Provo City, Utah November 29th, 1915.

BY THE COURT,

A. B. Morgan
Judge.

2888

Filed at Reno City, Utah November 28th 1913.

BY THE COURT

W. H. Mendenhall
Jury Co.

IN DIST. COURT
UTAH CO., UTAH.
* FILED *

E. P. Polgymann
Charles A. Ager
Deputy.